

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
America-CV Station Group, Inc.)	MB Docket No. 12-250
Licensee of Stations WJPX, San Juan,)	File No. CSR-8703-M
and WIRS, Yauco, Puerto Rico)	
)	
v.)	
)	
Liberty Cablevision of Puerto Rico, Inc.)	

To: Chief, Policy Division, Media Bureau
Filed electronically in MB Docket No. 12-250

REPLY TO OPPOSITION TO MUST-CARRY COMPLAINT

1. Introduction. America-CV Station Group, Inc. (“America-CV”) filed the above-captioned must-carry complaint against Liberty Cablevision of Puerto Rico (“Liberty”) on August 27, 2012.¹ After requesting an extension of time, Liberty Filed an Opposition on October 26, 2012. This is America-CV’s Reply to Liberty’s Opposition, filed pursuant to Section 76.7(c) of the Commission’s Rules.

2. Issues Remaining in Dispute. Four aspects of this proceeding have not been disputed and must therefore be accepted as established facts and conclusions:

a. Each of WJPX and WIRS is a must-carry station by default in the current election cycle, throughout Puerto Rico, having failed to elect retransmission consent status by October 1, 2012.

b. The must-carry exemption in Section 76.56(b)(5) of the Rules for stations that duplicate the same programming no longer applies.

¹ The Commission gave public notice of the *Petition in Special Relief and Show Cause Petitions*, Report No. 0381, released September 7, 2012.

c. The Commission treats the entire Island of Puerto Rico as one DMA for cable carriage purposes.

d. Liberty is currently carrying programming from the second digital stream of WJPX, Channel 24.2, and is carrying no other signal being transmitted by any America-CV station.

3. The following aspects appear to be in dispute:

a. Whether America-CV made an adequate demand for carriage of WIRS.

b. Whether Liberty was entitled to change carriage of WJPX from Channel 24.1 to Channel 24.2 when America-CV moved its AméricaTévé program service from Channel 24.1 to Channel 24.2.

c. Whether WIRS is disqualified from mandatory carriage because its over-the-air signal is not of adequate strength at Liberty's principal headend at Humacao, Puerto Rico.

4. Adequacy of Must-Carry Demand. Liberty states that "[t]he June 19th 2012 letter [from America-CV to Liberty] was not sufficient to constitute a Must Carry Request for WIRS and was nothing more than a notification that the programming of WIRS would change."² That letter, which was an exhibit to its Must-Carry Complaint, said:

This is to notify you that television station WIRS, Yauco, Puerto Rico, hereby exercises its must-carry rights on your cable television system.... This is a formal request for carriage, under the mandatory carriage provisions of Section 614(b)(1)(B) of the Communications Act of 1934...and Section 76.56(b)(2) of the Rules and Regulations of the Federal Communications Commission (FCC).

It is difficult to conceive of any more direct language demanding mandatory carriage than "hereby exercises its must-carry rights" and "[t]his is a formal request for carriage under the

² Opposition at p. 3.

mandatory carriage provisions.” Liberty’s claim that the request was deficient is a disingenuous statement which deserves a crisp rejection by the Commission.

5. Liberty’s statement that “there was no mention as to what channel WIRS should be carried on” is also simply incorrect. The letter stated that “[w]e request carriage on cable channel 41....” While America-CV does not concede that a request for default cable channel placement pursuant to Section 76.57(f) must be explicitly recited in a must-carry demand, America-CV did recite its placement request, in very plain and direct language. There is no unresolved legal or factual question here.

6. Which WJPX Stream Has Must-Carry Rights. Liberty next claims that it is in compliance with its must-carry obligation for WJPX, because it carries the same AméricaTévé programming from WJPX that it previously carried, albeit now on Channel 24.2 rather than Channel 24.1.³ America-CV does not dispute Liberty’s argument that “[t]he broadcaster must elect which programming stream is its primary video, and the cable operator is required to provide carriage of that stream.”⁴ The problem with that argument is that America-CV has chosen, but Liberty refuses to honor the choice.

7. When WJPX terminated analog service and became a digital-only station in 2009, Liberty carried WJPX Channel 24.1. America-CV did not complain, because carriage of Channel 24.1 is what it wanted. Then in 2012, America-CV changed the programming on Channel 24.1. It said nothing to Liberty, because it did not want carriage of Channel 24.1 to change. There is nothing in any must-carry statute or regulation that links mandatory carriage rights to program content. Indeed, it would be most dangerous to the concept of free speech, let alone contrary to the must-carry statute, to allow cable companies to erode the effectiveness of

³ Opposition at p. 2.

⁴ Opposition at p. 6, citing *Second Report and order and First Order on Reconsideration*, 20 FCC Rcd 4516 (2005). *See also* fn. 3 of the Must-Carry Complaint.

the statute by passing judgment on a TV station's program consent. America-CV could have changed the programming of WJPX to anything it wanted without affecting its must-carry rights. It so happens that the programming change on WJPX was the introduction of the new MundoFox network on Channel 24.1, and AméricaTévé programming was moved to Channel 24.2. Liberty made a unilateral decision to follow the content, without a request from or notice to America-CV, when WJPX's must-carry rights relate to the channel and not program content.

8. Liberty complains that America-CV gave it no notice of its programming change,⁵ but a broadcast licensee is not required to inform cable operators of changes in program content when it is not requesting any change in which signal stream should be carried.⁶ Liberty should have either continued carriage of Channel 24.1 or contacted America-CV to see if America-CV would like carriage changed to Channel 24.2. If Liberty had done that, America-CV would have insisted on continued carriage of Channel 24.1. Liberty blames America-CV, but America-CV did not do anything that affected its must-carry rights. On the contrary, Liberty unilaterally made a change that it was not entitled to make.

9. If for some reason it was not clear to Liberty before, it should surely be clear now that America-CV demands carriage of over-the-air virtual Channel 24.1 on cable Channel 24. That is America-CV's statutory right, and Liberty must honor it now. Moreover, there should be no need to notify subscribers of any change, pursuant to Section 76.1601, because no station is being "deleted" or "repositioned," which are the only two events which invoke that rule. WJPX has been on cable Channel 24 and is remaining there. Accordingly, Liberty should be directed to restore carriage of Channel 24.1 immediately.

⁵ Opposition at p. 2.

⁶ Liberty cites no authority to the contrary.

10. Adequacy of WIRS Signal. Liberty's claim that "WIRS cannot place a signal in compliance with section 76.55(c)(3) of Liberty's principal headend"⁷ is inconsistent with its current practice and moreover irrelevant. America-CV never said that the WIRS signal over-the-air on Channel 41 is sufficient, at least with the station's currently operating facilities.⁸ America-CV noted that the programming of WIRS is available on WJPX Channel 24.2, which is of adequate strength at the Liberty headend. Liberty does not dispute the availability of Channel 24.2 but argues that it is not required to accept delivery of WIRS in that manner, even though Liberty is carrying Channel 24.2 now, making it difficult for Liberty to dispute that Channel 24.2 is in fact receivable with an adequate signal.

11. Liberty goes to great length to dispute America-CV's argument that it is entitled to deliver the WIRS signal via WJPX Channel 24.2 based on *Jovon Broadcasting Corp. v. RCN Corp. Request for Mandatory Carriage of Television Station WJYS-TV, Hammond, Indiana*, 18 FCC Rcd. 8145 (2003). Liberty essentially tries to write *Jovon* off the books by claiming that

⁷ Opposition at p. 3. This claim is not entitled to recognition by the Commission, because it is not adequately supported. The date of the test is not given, no statement is made other than that a Blonder Tongue model AQDATSC was used (Opposition at fn. 7), and no test results are presented. See *Must Carry and Retransmission Consent Requirements*, 8 FCC Rcd 2965, 2990-91 (1993): "The cable operator's notification that a broadcast station is failing to deliver a good quality signal to the system's principal headend should provide the broadcaster with a list of the equipment used to make the initial measurements. Additionally, the cable operator must include a detailed description of the reception and over-the-air signal processing equipment used, including sketches and a description of the methodology used by the cable operator for processing the signal at issue. This information must include the specific make and model numbers and age of all equipment. Moreover, cable operators are expected to cooperate fully with local broadcasters in supplying relevant data [footnote omitted]." When a cable operator fails to conduct tests pursuant to all established procedures, the Commission will not rely on such tests to disqualify a station from must-carry, especially where the station offers alternative delivery. See *Sonshine Family Television, Inc. v. RCN Telecom Services of Philadelphia, Inc.*, 21 FCC Rcd 8460, 8463 (MB 2006).

⁸ America-CV noted that WIRS holds a granted construction permit to increase power, which should improve its signal at the Liberty headend. Must-Carry Complaint at p. 4.

the case was only a temporary expedient during the digital transition.⁹ America-CV does not concede that *Jovon* is not binding; but deciding the continuing precedential value of that case is not necessary to resolve the instant proceeding, because on October 17, 2012, nine days prior to the date of Liberty's Opposition, undersigned counsel sent an e-mail to Liberty's Regulatory Specialist stating:

[Y]ou said that the main objection to carrying WIRS was that the signal from WIRS was not strong enough at the Liberty headend, and you would not accept delivery of WIRS' programming via the second digital stream of WJPX. We talked about delivery by fiber or microwave instead.

WIRS has arranged for delivery to the Liberty headend by optical fiber. This should solve your problem with the delivery method.

Liberty did not respond to that e-mail, which requested confirmation that upon installation of the fiber link, Liberty would carry WIRS on cable Channel 41; nor did Liberty respond to a follow-up e-mail on October 19, 2012.

12. Liberty's complaint about the signal quality of WIRS in effect admits that if America-CV provides alternative delivery, pursuant to Section 76.55(c)(3), then Liberty must carry the signal of WIRS. That rule applies whether America-CV makes an explicit offer or not; but in this case, America-CV made such an offer on October 17, 2012.¹⁰ Thus it is clear that Liberty is obligated to carry WIRS.

13. Who is Playing a Shell Game? While Liberty accuses America-CV of playing a "Shell Game" to force Liberty to carry more than one stream from a must-carry station,¹¹ America-CV has never played any kind of game. It has complied with each and every requirement for two separate stations with separate programming to exercise must-carry rights,

⁹ Opposition at pp. 5-6.

¹⁰ America-CV has already ascertained the availability of a fiber link and the fact that it will not take long to install.

¹¹ Opposition at p. 3.

by (a) not making an election and so becoming must-carry by default; (b) notifying Liberty when the programming of the two stations would become different, with a clear request for carriage of WIRS on cable channel 41; (c) filing a timely-must carry complaint; and (d) explicitly offering to deliver the signal of WIRS by optical fiber. Each step has been properly undertaken, and America-CV is clearly entitled to relief.

14. In contrast, Liberty has played games by ignoring America-CV's correspondence, arbitrarily changing the stream of WJPX being carried, and fighting tooth and nail to avoid having to add WIRS as a second signal and to restore WJPX to its rightful carriage position. The result has been to cripple America-CV's launch of the MundoFox network in Puerto Rico – something Liberty had no right to do, because it was not entitled to change the stream of WJPX it carried based on its judgment about program content. The Commission should not countenance this behavior and should swiftly order Liberty to comply with all of its carriage and channel placement obligations.

15. Conclusion. The current situation is: (a) carriage of WIRS or WJPX 24.2 – whichever you want to call it – on cable channel 24; (b) no carriage of WJPX's primary MundoFox programming at all; (c) no carriage of either station on cable channel 41, where WIRS is entitled to be placed;¹² and (d) carriage of only one of the two required stations – no matter which name you give it, only one station is on the cable system.

16. The correct situation, which the Commission must order promptly, is: (a) carriage of WJPX Channel 24.1 on cable channel 24, and (b) carriage of WIRS on cable channel 41, *via*

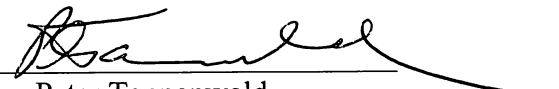
¹² WIRS transmits over-the-air on channel 41. Its virtual channel is 42. While America-CV has requested carriage of WIRS on cable Channel 41, it is aware of cases holding that placement rights accrue to only a station's virtual channel number. If Liberty offered to carry WIRS on cable channel 42 instead of 41, America-CV would be willing to negotiate the placement issue. So far, Liberty has offered no channel for WIRS apart from the channel on which WJPX is entitled to placement.

channel 24.2 or optical fiber.¹³ The Commission should order this result immediately. Moreover, there should be no delay for notice to subscribers before restoration of carriage of WJPX Channel 24.1. Notice should be required only with respect to replacement of the current programming on cable channel 41 to make room for WIRS.

17. In sum, Liberty is doing one thing that it is not required to do and is doing neither of the two things that it is required to do. This situation has to be fixed. Since private discussions have failed to achieve a resolution, Commission intervention is needed and is needed quickly to avoid the artificial and unlawful burden that Liberty has placed on the development of the new MundoFox network in Puerto Rico.

Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th St., 11th Floor
Arlington, VA 22209-3801
Tel. 703-812-0404
Fax 703-812-0486

Respectfully submitted,


Peter Tannenwald

Counsel for America-CV Station Group, Inc.

November 8, 2012

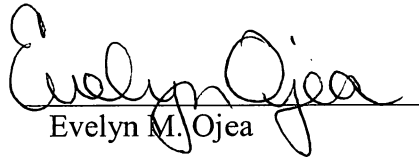
¹³ America-CV stands by its request that the Commission order Liberty to accept delivery of WIRS via Channel 24.2, the way Liberty is picking up the signal now, because insisting on optical fiber will raise America-CV's operating costs without justification or need. However, the optical fiber is available if the Commission declines to order Liberty to accept delivery *via* Channel 24.2.

CERTIFICATE OF SERVICE

I, Evelyn M. Ojea, do hereby certify that I have, this 8th day of November, 2012, caused a copy of the foregoing "Reply to Opposition to Must Carry Complaint" to be sent by first class United States mail, postage prepaid, to the following:

Isabel C. Berrios, Regulatory Specialist
Liberty Cablevision of Puerto Rico, LLC
P.O. Box 719
Luquillo, PR 00773-0719

Junta Reglamentadora de Telecomunicaciones
500 Ave Roberto H Todd (Pda 18 - Santurce)
San Juan, PR 00907-3941
(and also by e-mail to correspondencia@jrtpr.gobierno.pr)


Evelyn M. Ojea